Volume 24, Number 1, 2004

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Supreme Court Answers Clean Water Act Question

Remands Case for More Fact-Finding

***S. Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004)**

Josh Clemons, M.S., J.D.

On March 23, 2004, the U.S. Supreme Court issued an opinion in the case of *S. Fla. Water Management Dist. v. Miccosukee Tribe of Indians* that settles one long-disputed legal issue under the Clean Water Act (Act) but returns the case to the lower court for further proceedings on an unresolved factual question. The Court also left undecided a novel question, first raised by the U.S. government, about the reach of the Act's jurisdiction.

Background

The Florida Everglades have been harnessed by extensive engineering projects to serve a variety of human needs. Once wild, the 'glades are now criss-crossed with the roads, levees, and canals necessary for a growing population to live in peace with what is essentially an enormous swamp. One of these canals is the C-11 canal, which collects runoff from western Broward County. The South Florida Water Management District's S-9 pumping station lifts this water over a levee and drops it into Water Conservation Area 3 (WCA-3), an undeveloped vestige of the natural Everglades upon which the

See Clean Water Act, page 10

Mississippi High Court Upholds Denial of Lease to Casino

Affirms Secretary of State's Authority over Tidelands

***Columbia Land Dev., LLC v. Clark*, No. 2002-CA-02025-SCT (Miss. March 25, 2004)**

Josh Clemons, M.S., J.D.

Columbia Land Development owns approximately 440 acres of tidelands on an area of Bay St. Louis known as Bayou Portage, between the cities of Pass Christian and De Lisle, Mississippi, upon which it hoped to build a

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In This Issue . . .

Without Standing, Fisheries Act Lawsuit Tumbles

***Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Management Council*, No. 03-30545 (5th Cir. Mar. 19, 2004)**

Luke Miller, 2L

Fishing in the Gulf of Mexico is an important aspect of coastal life and a significant vein of revenue. When a federal action or management plan threatens to limit or infringe on the commercial fisher's livelihood, it should come as no surprise that the fisher's representative association might have a word or two to say. That is exactly what happened in the first three months of 2004 as the Delta Commercial Fisheries Association, through a lawsuit, questioned the lack of representation for their organization that they believe is required by a federal statute.

Background

In an effort to help control over-fishing in the waters of the U.S., Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act.[1] The Act created several regional fishery management councils, which work closely with the Secretary of Commerce to manage fishery resources. Management comes primarily in the form of detailed plans instituting regulations and catch limits specifically designed for the region in question. These plans undergo public comment, fine-tuning, and eventual submission to the Secretary for approval.

The membership of the councils is in large part comprised of appointments made by the Secretary. Governors of the represented states in each regional council consult with commercial and recreational fishing representatives "to the extent practicable," then supply a list to the Secretary of three qualified individuals for each vacancy on the council.[2] After determining that all the candidates are qualified, the Secretary "shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council."[3]

Claims in Delta's Lawsuit

Delta had a concern with the membership balance of the Council, which Delta felt might be creating regulations biased towards recreational interests and practices. Delta points to the fact that over the last four years, seven of the eleven appointed council members have been representatives of recreational interests, yet only three or four members are considered to represent com-

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Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: **waterlog@olemiss.edu** . We welcome suggestions for topics you would like to see covered in WATER LOG.

Editor: **Josh Clemons, M.S., J.D.**

Publication Design: **Waurene Roberson**

Contributors:

Luke Miller, 2L **Leah Huffstatler, 2L**

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Publication Announcement

Marine Protected Areas in the Gulf of Mexico: A Survey

The Mississippi-Alabama Sea Grant Legal Program is pleased to announce the publication of *Marine Protected Areas in the Gulf of Mexico: A Survey* coauthored by Stephanie Showalter, Director of the Sea Grant Law Center, and Lisa Schiavinato, Legal Coordinator for the Louisiana Sea Grant Legal Program. *MPAs in the Gulf of Mexico* identifies those marine and coastal areas in the Gulf of Mexico that receive heightened protection through state and/or federal laws and regulations. For each site, the authors have identified the managing agency, provided a site description, and summarized enabling legislation and existing regulations. The publication is available in hard copy and online at:
http://www.olemiss.edu/orgs/SGLC/.

Pipeline Owners Liable for Relocation Costs

***Air Liquide America Corp. v. U.S. Army Corps of Engineers,* 359 F.3d 358 (5th Cir. 2004)**

Leah Huffstatler, 2L

The Fifth Circuit Court of Appeals recently held that owners of pipelines under the Houston Ship Channel are responsible for the relocation costs of those pipelines incurred as a result of a channel expansion project by the U.S. Army Corps of Engineers and Port of Houston Authority.

Photograph of Houston courtesy of NOAA
Photograph by Mrs. Marge Beaver, Photography Plus, 231-798-2395

Background

In 1995, almost thirty years after Congressional authorization to study improvements to the Houston Ship Channel, the U.S. Army Corps of Engineers (Corps) published a draft report for public review that recommended proceeding with the channel's expansion. This draft report stated that the pipeline owners would bear the cost for relocation of approximately 130 pipelines. No owners responded to this report. Several months later a final notice was published, again stating that the owners would be responsible for the costs now estimated to exceed $100 million. No owner responded to this notice either.

The following year, the expansion project was authorized by the Water Resources Development Act of 1996 (1996 WRDA) which provided that "[t]he removal of pipelines … that are necessary for the project shall be accomplished at non-Federal expense."[1] In 1998 the Port of Houston entered into a Project Cooperation Agreement with the Corps; shortly thereafter, the Port requested that the Corps exercise its permitting authority to instruct the owners to relocate their pipelines at their own expense. (Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, authorizes the Corps to issue permits for the installation of private pipelines in navigable waters.) Each pipeline owner is a § 10 permit holder and subject to the permit's mandate that the government is not to bear the cost of pipeline relocation as required by navigation needs. The owners complied with the § 10 request.

Procedural History

After initially complying with the request, the owners simultaneously filed federal and state actions – later consolidated - seeking a declaration that the Corps' removal notices were void and claiming that pursuant to Texas law, the Port had required the relocation and was therefore responsible for the cost. Alternatively, the owners claimed the project was actually for a deep-draft harbor and governed by the Water Resources Development Act of 1986 (1986 WRDA),[2] which allocates relocation costs among the owners and the Port. The Port counterclaimed, seeking a declaration that either the 1996 WRDA or the § 10 permits required the owners to pay the relocation cost.

In 2002, the district court granted partial summary judgment to the owners, holding that the 1986 WRDA was controlling, and that under its provisions Texas law was to answer the cost allocation question. Thus, the Port was to be responsible for all relocation costs. The court then amended the Corps' removal notices to reflect the ruling. Additionally, it rejected the owners' claim that the project was for a deep-draft harbor.

Holding

On appeal, the Fifth Circuit determined that neither of the two WRDAs nor Texas law controls cost allocation. First considering the state law issue, the court noted that in order to trigger the application of state law, the Port had to require the relocation. The court held that the Port did not and, in fact, could not do this. In its ruling,

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Alligator Marketing Subsidy Violates First Amendment

Photograph of alligator courtesy of ©Nova Corp.

***Pelts & Skins, LLC v. Landreneau*, No. 03-30523 (5th Cir. April 2, 2004)**

Josh Clemons, M.S., J.D.

Recently in Louisiana the world's largest alligator-farming operation asserted that its First Amendment rights were violated when a state agency used a portion of the fees it paid to support generic alligator advertising with which it disagreed. The alligator-farming operation prevailed on one if its First Amendment claims, but lacked standing to assert its other claim.

Background

The Louisiana Department of Wildlife and Fisheries (DWF) regulates the hunting, farming, processing, and shipment of alligators and alligator parts in Louisiana. DWF also administers the Louisiana Fur and Alligator Public Education and Marketing Fund (Marketing Fund) and the Louisiana Alligator Resource Fund (Resource Fund). The money in the Marketing Fund comes from fees charged for alligator hunting licenses. The money in the Resource Fund comes from several sources, including "tag fees" assessed on alligator farmers for the tags that must be attached to each alligator. DWF is authorized to channel money from these funds to the state-created Louisiana Fur and Alligator Advisory Council (Council) to be used for generic marketing efforts, of the "Got Milk?" or "Pork: The Other White Meat" variety.

Pelts & Skins, LLC, the giant of the alligator-farming industry, pays a proportionately giant-sized twenty-five percent of DWF's alligator-related fees: in a typical year the company pays state fees totaling about $320,000. DWF spends about one-fourth of the fee revenues on alligator-related marketing and public education, so approximately $80,000 of each year's marketing budget is funded by Pelts & Skins.

The Council uses its marketing funds to spread the message that "alligator products in general are desirable, reliably available, and lawfully produced."[1] The Council does not distinguish among the products from different makers; its message is that *all* Louisiana alligator products are good. Pelts & Skins, however, prides itself on producing alligator products that are superior to other alligator products. It believed that the state's advertising campaign diluted the value of its superior products by equating them in consumers' minds with lesser products. Pelts & Skins did not appreciate being forced to pay a sizeable part of the cost of spreading this message, so it sued in federal district court in Louisiana to enjoin the state from spending money from the Resource Fund and Marketing Fund on generic alligator marketing.[2] Pelts & Skins claimed that the state violated its First Amendment rights by compelling it to subsidize a message with which it disagreed. The district court sided with Pelts & Skins and granted the injunction. The state appealed to the U.S. Court of Appeals for the Fifth Circuit.

Government Speech vs. Private Speech

The circuit court first held that Pelts & Skins had not established standing to challenge the Marketing Fund expenditures because it had not presented evidence that it held an alligator hunting license or paid a fee that went into the Marketing Fund. The company did, however, have standing to challenge the Resource Fund because it pays tag fees.

The First Amendment protects freedom of speech not only by limiting the government's power to *prohibit* private speech but also by limiting its power to *compel* private speech. In determining whether Pelts & Skins' First Amendment rights were violated by being compelled to pay for speech with which it disagreed, the court first had to decide whether the speech in question - the generic marketing - was private speech or "govern-

ment speech." The distinction is important because the government does not violate the First Amendment when it speaks for itself, as when promoting a public policy, even when some of the citizens who finance the speech disagree with it (otherwise, government could never promote any policy at all). The government *may* violate the First Amendment in some situations when it facilitates private speech, though.

The court decided that the generic alligator marketing was not government speech for three reasons. First, government speech is typically funded out of general revenues, rather than paid for by a particular group. The Resource Fund is financed only by the particular group whose interests are supposedly being served by the generic marketing: harvesters of furs and alligators. Second, the Council, despite being appointed by the state, is more like a private entity than a government entity because it consists mainly of private individuals who are involved with harvesting furs and alligators. It is the Council, not DWF, that primarily makes decisions on the content of the generic marketing and how the state money will be spent. Third, the policies underlying the government speech doctrine were not implicated in this case. The court mentions two policies: avoiding the multitudinous lawsuits that would arise if any citizen could sue the government for promoting a policy with which he or she disagrees; and the political accountability of the government when the costs of its speech are imposed on the general electorate instead of on a particular group.

Permissibility of Compelled Subsidy

Having determined that the fee money used for generic alligator marketing was a compelled subsidy for private speech, the court next had to determine whether the compelled subsidy was permissible. The court based its reasoning on two U.S. Supreme Court decisions dealing with compelled subsidies for generic marketing: *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), in which a subsidy was upheld, and *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001), in which a subsidy was struck down.

At issue in *Glickman* was a statute that essentially collectivized peach farmers by legally displacing competition through means including price controls, uniform quality standards, and exemption from antitrust laws. Some of the assessments charged to farmers under the plan were used to pay for generic advertising. A few farmers objected, but the Court upheld the assessments because the farmers were "part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme."[3] The compelled subsidy did not violate the peach farmers' First Amendment rights.

The *United Foods* case bears more resemblance to the case at hand. In *United Foods*, one mushroom grower objected to a generic marketing campaign message that all mushrooms are good because it believed that its mushrooms were superior and protested paying for its product to be implicitly lumped in with lesser mushrooms. The regulatory scheme that compelled mushroom farmers to pay for generic marketing was not part of a "broader collective enterprise" like the one in *Glickman*. Rather, the main purpose of the regulation was to raise money to market mushrooms. This compelled subsidy violated the mushroom farmer's First Amendment rights.

The circuit court elucidated a "guiding principle" from the two cases: "When the government binds individuals into a collective association, the government can also require that those persons subsidize speech germane to the purpose underlying the association."[4] Alligator producers had not been bound into a collective organization like the peach farmers in *Glickman*; thus, using the fees Pelts & Skins was compelled to pay into the Resource Fund for the generic alligator marketing with which it did not agree was impermissible.

Conclusion

Pelts & Skins prevailed in its claim that the Louisiana Department of Wildlife and Fisheries violated its First Amendment right not to be compelled to subsidize speech with which it does not agree when the agency used fees paid into the Louisiana Alligator Resource Fund to pay for generic marketing of alligator products. The agency may no longer use the Resource Fund for that purpose. The question of whether Pelts & Skins has standing to challenge the similar use of the Louisiana Fur and Alligator Public Education and Marketing Fund was remanded to the district court for more fact-finding.

ENDNOTES

1. *Pelts & Skins, LLC v. Landreneau*, No. 03-30523, slip op. at 5 (5th Cir. April 2, 2004) (*Pelts II*).
2. *Pelts & Skins, LLC v. Jenkins*, 259 F. Supp.2d 482 (M.D. La. 2003) (*Pelts I*).
3. *Pelts II*, slip op. at 18 (internal quotes and citations omitted).
4. *Id.*

No Relief for Widow in Scuba Death Case

Fifth Circuit Affirms District Court's Dismissal

***Delgado v. Reef Resort Ltd.*, No. 03-60611 (5th Cir. April 13, 2004)**

Josh Clemons, M.S., J.D.

A tort suit brought by the widow of a man who died during a scuba expedition was dismissed by the U.S. District Court for the Southern District of Mississippi for lack of personal jurisdiction. The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal, because the plaintiff was unable to establish jurisdiction under either the Mississippi "long-arm" statute or the Federal Rules of Civil Procedure.

Background

In August 2001, during a scuba expedition off the coast of Belize, Dr. Ruben Delgado went on a dive and never resurfaced. He is presumed to be dead. The trip was organized by a company that is jointly operated by the defendants Reef Resort Ltd. and Headrick Companies, Inc. Headrick is a Mississippi resident; Reef Resort is situated in Belize, but does business in the state of Mississippi.

Dr. Delgado's wife, Maribel, is a Florida resident. She sued the defendants in Mississippi state court for negligence. The defendants removed the case to federal district court in Mississippi,[1] then moved to dismiss on the ground that the court did not have jurisdiction over them. The district court ruled that it had jurisdiction over Headrick because it is a Mississippi company, but did not have jurisdiction over Belize company Reef Resort. Ms. Delgado appealed to the Fifth Circuit, claiming that there were two grounds upon which the district court could base personal jurisdiction over Reef Resort.

Jurisdiction Under State Long-Arm Statute

Like most states, Mississippi has a so-called "long-arm" statute. A long-arm statute authorizes a state to exercise personal jurisdiction over a non-resident defendant, as long as the exercise of jurisdiction is consistent with federal due process requirements. The Mississippi statute asserts jurisdiction over non-residents who enter into certain contracts with residents, commit torts in the state, or do business in the state.[2]

Reef Resort does business in Mississippi, and is therefore subject to the long-arm statute. Unfortunately for Ms. Delgado, the Fifth Circuit had previously interpreted the Mississippi long-arm statute as not permitting a non-resident to sue a non-resident corporation. Since Ms. Delgado was a Florida resident, she could not take advantage of the statute to bring Reef Resort before the court.

Stymied by the unfavorable precedent, Ms. Delgado attacked the precedent itself on the grounds that it violated her rights under the Privileges and Immunities Clause of the U.S. Constitution.[3] The Fifth Circuit had previously held that the Mississippi long-arm statute did not violate a non-resident plaintiff's rights under the Privileges and Immunities Clause, but Ms. Delgado argued that a later U.S. Supreme Court decision changed the law in her favor. The court disagreed and held to its earlier precedent. Jurisdiction over Reef Resort was not to be had under the long-arm statute.

Admiralty Jurisdiction

The Federal Rules of Civil Procedure provide another method of asserting jurisdiction over a defendant like Reef Resort who is not the citizen of a particular state but who has sufficient contact with the U.S. as a whole to foresee being brought into court there.[4] The claim must arise under federal law, though, so the state law negligence claim would not work. An admiralty suit, on the other hand, would work because admiralty suits arise under federal law. Accordingly, Ms. Delgado alleged that Reef Resort had committed a maritime tort, subject to admiralty jurisdiction, that resulted in Dr. Delgado's death.

Three elements must be present for a maritime tort to arise: the mishap must occur on navigable waters, it must affect maritime commerce, and the activities leading to the mishap must be connected to traditional maritime activity. Dr. Delgado's demise occurred on navigable waters, so the first requirement was met. Ms. Delgado argued that the other two elements were present because "1) Dr. Delgado was transported to the dive site by vessel, 2) improper preparations were made for the dive, many of which would or should have occurred on the vessel on the way to the dive, 3) the negligence of the dive crew caused disruption of maritime commerce because it generated numerous distress calls, and 4) at the time of Dr. Delgado's death he was being supervised by members of the vessel's crew."[5] The district court found that there was no connection to maritime commerce or traditional maritime activity, and the circuit court was not persuaded otherwise.

A Missed Opportunity

Another route to admiralty jurisdiction was available to Ms. Delgado but she failed to take it. The Death on the High Seas Act (DOHSA) provides a cause of action in admiralty "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of" the U.S.[6] Unfortunately for Ms. Delgado, she did not attempt to bring her claim under the DOHSA at the district court level and thus forfeited the argument. This error was a grave one, because the circuit court observed that the Act "plainly provides admiralty jurisdiction in this case."[7]

Conclusion

Maribel Delgado was unable to pursue her negligence suit against the resort company that she claimed was responsible for her husband's death because she could not establish jurisdiction over the defendant, a citizen of Belize. The Mississippi long-arm statute was unavailable to her because she is not a Mississippi resident; her husband's accident did not involve a maritime tort that would confer admiralty jurisdiction; and she failed to bring her case under the Death on the High Seas Act, which would have conferred admiralty jurisdiction.

Divers returning to surface. Photo courtesy of OAR/National Undersea Research Program (NURP)

ENDNOTES

1. A federal court has jurisdiction to hear a case brought under state law (here, the state law tort of negligence) when the defendants are from different states (including a foreign country, as long as one defendant is a U.S. citizen), and the dollar amount at issue is at least $75,000. 28 U.S.C. § 1332.
2. Miss. Code § 13-3-57.
3. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.
4. Fed. R. Civ. P. 4(k)(2).
5. *Delgado v. Reef Resort Ltd.*, No. 03-60611, slip op. at 5-6 (5th Cir. April 13, 2004).
6. 46 App. U.S.C. § 761.
7. *Delgado*, slip op. at 7.

Mississippi Appeals Court Okays Wetland Fill

Upholds Reversal of Agency Permitting Decision

***Miss. Dept. of Marine Resources v. Brown*, No. 2002-SA-01404-COA (Miss. App. 2003)**

Josh Clemons, M.S., J.D.

The Court of Appeals of Mississippi recently upheld the Jackson County Chancery Court's reversal of a decision by the Mississippi Commission on Marine Resources (Commission) denying a permit to fill 1.64 acres of wetlands. The property owners will be allowed to fill the wetlands and build a parking lot for their bait shop, and add two hundred feet to their pier.

Background

Sydney and Stephanna Brown, owners of a boat launch facility and bait shop in Jackson County, sought to better accommodate their customers by building a parking lot and extending their pier. In October 1999 they applied to DMR for permission to fill approximately 1.64 acres of tidally-influenced marsh for that purpose. The project would require 7,900 cubic yards of fill material.

After examining the site and taking comments from the public and interested government entities, the Mississippi Department of Marine Resources (DMR) submitted a report of its findings to the Commission. The Commission, comprised of residents of Mississippi's three coastal counties,[1] is charged with administering the Coastal Wetlands Protection Act (CWPA) and the Public Trust Tidelands Act and therefore makes the final decision on requests to fill coastal wetlands. The Commission denied the permit on the grounds that the public interest in the expansion of the Browns' facilities did not outweigh the state's public policy in favor of preserving the natural state of coastal wetlands and their ecosystems.[2] The Browns appealed this adverse decision to the Jackson County Chancery Court, pursuant to the CWPA.[3] The chancery court found that the Commission had (1) failed to provide some of the necessary evidence to support its decision; (2) failed to consider the 416 signatures and fifty-one letters from the public that showed the public need for the Browns' facilities; and (3) deprived the Browns of legal use of their land, because only one-third of an acre was within DMR jurisdiction. The court reversed the Commission. DMR appealed to the Court of Appeals of Mississippi.

The Court of Appeals' Analysis

Under the CWPA, a chancery court must affirm the Commission's decision to grant or deny a permit to fill coastal wetlands if the decision "is supported by substantial evidence, consistent with the public policy set forth in this chapter, is not arbitrary or capricious and does not violate constitutional rights."[4] The court examined each of these four elements individually.

Substantial evidence. In support of the permit denial, the Commission argued to the chancery court that there were already boat ramps in the area and the need for additional ramps was unproven; that the U.S. Fish and Wildlife Service had indicated plans to replace the existing facility with a better one in the future; and that the proposed fill could damage the area's ecosystem by displacing plants and animals. The chancery court nonetheless found that the Commission's decision was not supported by substantial evidence.

Public policy. The public policy expressed in the CWPA favors the preservation of coastal wetlands and their ecosystems except in cases where alteration would serve a higher public interest.[5] On the other hand, the court observed that the Mississippi Coastal Program expressly allows minor construction in areas like the Browns' and also expresses a policy favoring access to the water for boating, recreation, etc. In light of the public support for the Browns' project, the appeals court approved the chancery court's decision that the public policy considerations supported granting the permit.

Arbitrary and capricious. An administrative agency decision is arbitrary and capricious if it is not based on substantial evidence, or is not in accordance with facts and/or law. The Browns successfully argued a couple of points. First, the CWPA contains an exemption for riparian owners building piling-supported structures if the structure permits reasonably unobstructed ebb and flow of the tide.[6] Second, the Commission had permitted a similar project in the past, which indicated that the Commission did not really think a pier would impact the area negatively. In the court's view, these facts made the Commission's decision arbitrary and capricious.

Constitutional rights. The Browns asserted that the Commission deprived them of due process of law and took their property without just compensation; howev-

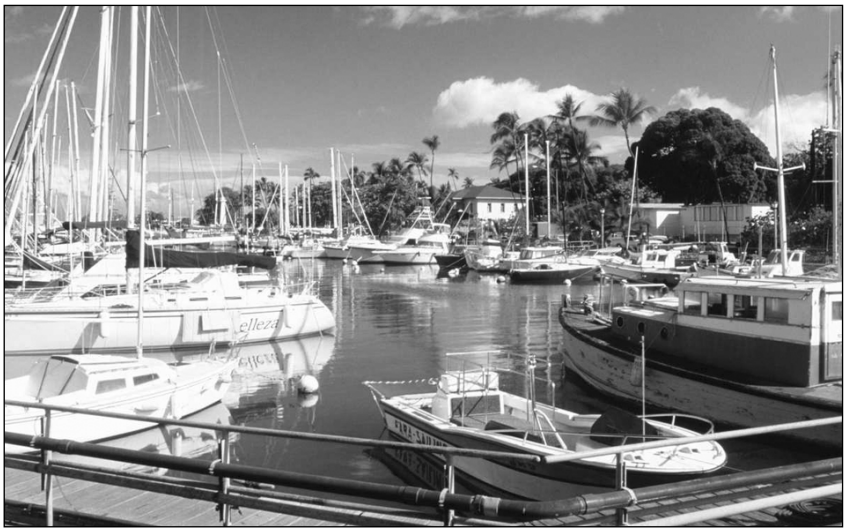
er, the court of appeals declined to address those issues because it affirmed the chancery court's decision on other grounds.

Conclusion

Because the Commission's denial of the Browns' wetlands fill permit was not supported by substantial evidence, was inconsistent with the public policy of the CWPA, and was arbitrary and capricious, the denial was reversed.

ENDNOTES

1. The Commission includes two members from each county (one commercial seafood processor, one commercial fisherman, one recreational sports fisherman, one charter boat operator, one member of an incorporated nonprofit environmental organization, and one representative of nonseafood industry) and the member of the Commission on Wildlife, Fisheries and Parks from the Fifth Congressional District. Miss. Code § 49-15-301.
2. *See* Miss. Code § 49-27-3 (declaring state's public policy of preserving coastal wetlands).
3. *Id.* § 49-27-39(a).
4. *Id.* § 49-27-39(b).
5. *Id.* § 49-27-3.
6. *Id.* § 49-27-7(e). The court did not explain why, if this exemption was applicable, it did not by itself determine the case in the Browns' favor.



Photograph of pier courtesy of ©Nova Corp.

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the district court relied on the principle of agency and determined that the Corps acted on the Port's behalf and as its agent when it issued the removal notices. The Fifth Circuit disagreed and said that for this to be considered an agency relationship, the Port must be in control of the Corps and that is simply not the case since the Corps was acting pursuant to its congressionally delegated authority to require the relocation.[3]

The court went on to discuss the Corps' power under the federal navigational servitude to require owners to pay the relocation costs according to the original § 10 permits. Noting that this power cannot be trumped in the absence of a clear congressional waiver and finding no such waiver in either WRDA in question, the court determined that the pipeline owners are bound by their § 10 permit obligation to relocate their pipelines as required by the Corps at no cost to the government.[4]

Finally, the court considered the issue of whether the project is for a deep-draft harbor and thus subject to cost-sharing provisions of the 1986 WRDA. Affirming the district court's decision on this matter, the court held that the project does not meet the requirements to be considered a deep-draft harbor.[5]

Conclusion

The court of appeals vacated the district court's judgment allocating pipeline relocation costs to the Port and amending the Corps' removal notices while affirming the decision that the channel expansion did not qualify as a deep-draft harbor project. The Corps and the Port prevailed.

ENDNOTES

1. Pub. L. No. 104-303, 110 Stat. 3658 (1996).
2. Pub. L. No. 99-662, 100 Stat. 4082 (1986).
3. *Air Liquide America Corp. v. U.S. Army Corps of Engineers,* 359 F.3d 358, 363 (5th Cir. 2004).
4. *Id.* at 365.
5. *Id.* at 366.

Clean Water Act, from page 1

Miccosukee Tribe (Tribe) relies for its subsistence, commercial, recreation, and religious needs. Among other things, the collected runoff is high in phosphorus, a plant nutrient and a pollutant under the Act. The introduction of C-11 water raises the phosphorus level in WCA-3, which in turn can lead to excessive plant growth and disruption of the delicate ecosystem. Under the Act, "the addition of any pollutant to navigable waters from any point source" requires a national pollution discharge elimination system (NPDES) permit.[1] The Act defines "navigable waters" as "the waters of the United States, including the territorial seas."[2] C-11 and WCA-3 are "navigable waters" within this definition.

In 1999 the Tribe, along with the Friends of the Everglades, sued to enjoin the South Florida Water Management District (SFWMD) from operating S-9 without a NPDES permit. SFWMD argued that no permit was necessary because the pollutant, phosphorus, was not "added" to WCA-3 "from" S-9; phosphorus was already in the runoff when it reached C-11 and all SFWMD did was move water from one part of the Everglades (C-11) into another (WCA-3). The U.S. District Court for the Southern District of Florida sided with the Tribe and granted the injunction.[3] The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's holding that SFWMD's operation of the pumping station was "the addition of a pollutant...from a point source" but vacated the injunction to protect Broward County from the flooding that would occur if S-9 stopped pumping.[4] SFWMD petitioned for a hearing in the U.S. Supreme Court.

On to the U.S. Supreme Court

The Supreme Court agreed to hear the case and answer one deceptively simple question: "Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a [NPDES] permit under the [Act]."[5] The Supreme Court agreed to answer the question because a split has developed in the lower courts in recent years.

For twenty years after the Act was passed the law developed in SFWMD's favor, exemplified by three major cases: *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). In *Appalachian Power* the Fourth Circuit held that the U.S. Environmental Protection Agency (EPA) did not have the authority to require industrial plants to remove pollutants that were pre-existing in their intake streams before discharging, because "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass."[6] In *Gorsuch* the D.C. Circuit deferred to EPA's interpretation that "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world" and not when a pollutant that enters water from non-point sources is simply passed through a point source from one navigable water to another - in that case, when pollution (includ-

Everglades photograph courtesy of ©Nova Corp.

ing phosphorus) already existing in a reservoir was passed through a dam to the river below.[7] *Consumers Power* concerned a facility that pumped water - and along with it, fish - uphill from Lake Michigan into a reservoir, then passed the water through turbines for power generation and discharged it - along with live fish, dead fish, and fish parts, which can be "pollutants" under the Act - back into Lake Michigan. The Sixth Circuit followed *Gorsuch* and held that EPA was justified in determining that this activity did not require a NPDES permit because the "pollutant" was already present in the water and not added by the point source.

The tide began to turn in 1996 when the First Circuit decided *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). In *Dubois* a ski resort had been pumping water uphill from a polluted river, using it in snowmaking operations, then discharging it into a nearly pristine mountain lake. The court held that movement through a pipe of a pollutant from a navigable water into a distinct navigable water, into which the first would not naturally flow, constituted "addition of a pollutant from a point source."[8] The Second Circuit followed similar reasoning in 2001 with its decision in *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). In *Catskill Mts.* New York City had been diverting water from a reservoir with high sediment concentrations through a tunnel into a "naturally clearer and cooler creek" that was "one of the premier trout fishing streams in the Catskill Region," from whence it was collected in a second reservoir for delivery to the city for drinking water. Absent the diversion tunnel, reservoir water would not naturally flow into the creek. The *Catskill Mts.* court echoed *Dubois*, emphasizing the importance of the distinction between moving water within the same water body (as in *Gorsuch* and *Consumers Power*) and transferring water from one water body into a distinct water body that would not normally receive flow from the first.[9]

SFWMD urged the Court to follow the *Gorsuch* reasoning, and the Tribe correspondingly advanced the *Catskill Mts.* approach. Justice O'Connor, for a Court that was unanimous on this question, endorsed the Tribe's position. Based on the Act's language and purposes, a point source requires a NPDES permit to discharge a pollutant even if the point source does not itself generate the pollutant. With one paragraph the Court ended almost three decades of controversy over key terms in the Act.

Although the Court answered an important legal question, it did not resolve the case between the parties. The district court had granted summary judgment for the Tribe without determining whether C-11 and WCA-3 are distinct water bodies, as the Tribe declared, or parts of a single large water body, as SFWMD insisted. Summary judgment is appropriate only if there is no genuine issue of material fact to be resolved; here, the Court found that there was such an issue because the record contained evidence that the two water bodies are hydrologically connected. Thus, the Court vacated the Eleventh Circuit's judgment and remanded the case for further proceedings.

The Government's Novel Question

Interestingly, the Court chose to devote approximately two pages of its opinion to an extremely unusual and novel argument offered by the federal government as *amicus curiae* ("friend of the court") and endorsed by SFWMD at oral argument. According to the government, "all the water bodies that fall within the Act's [NPDES jurisdiction] should be viewed unitarily for purposes of NPDES permitting requirements."[10] In other words, for discharge permitting purposes, there would be only one "water of the United States." Under this "unitary waters" approach, SFWMD would need no permit to operate S-9 because C-11 and WCA-3 would be, legally speaking, the same water.

The government based this creative argument on the language and structure of the Act. The crux of the government's theory is that NPDES does not apply to the "engineered transfer of one 'navigable water' into another"[11] because Congress intended for those situations to be addressed by state non-point source pollution programs. The government supplemented its argument by noting that EPA has a long-standing policy of not requiring NPDES permits for dams, and warning of the potentially dire economic results (particularly in the West) of requiring diversionary structures to treat the water that passes through them.

The Court was skeptical. In the first question during oral argument, Justice Breyer posited a heavily polluted river being piped into a pristine trout pond, and observed that under the government's interpretation no NPDES permit would be required.[12] One justice described the government's position as "extreme."[13] In the opinion, Justice O'Connor rebutted several of the government's claims but left the "unitary waters" issue open for argument when the case goes back to the lower courts, because it was not fully briefed and argued before the Court and was not essential to the single legal question the Court confronted.

See Clean Water Act, page13

Secretary of State, from page 1

"destination resort" including a casino vessel, a hotel, and a golf course. The surrounding area is rural, lightly populated, and connected to Pass Christian only by a narrow two-lane road.

In March 1996, after having secured permits from the Mississippi Department of Marine Resources (DMR) and the U.S. Army Corps of Engineers (Corps) to build a marina, Columbia applied to Mississippi Secretary of State Eric Clark for a public trust tidelands lease.[1] The Secretary told Columbia that he could not grant a lease until after the Mississippi Gaming Commission approved the site for a casino. In June 1996 the Gaming Commission unanimously approved the site. In September 1996 Secretary Clark sent a letter to Columbia informing it that its application for a tidelands lease was rejected because, based on his inspection of the site and his experience in the Mississippi Legislature at the time the Mississippi Gaming Control Act was passed (despite his vote against it), the site did not satisfy the legislative intent behind the Act. Secretary Clark said a lease could be granted for a marina at the site, however.

Columbia representatives met with officials from the Secretary's office several times in late 1996 in attempts to persuade the Secretary to change his mind. Unsuccessful in those attempts, Columbia filed suit in January 1997 in the Chancery Court of Harrison County for a declaration of its entitlement to the tidelands lease.

The Chancery Court Decision[2]

Columbia argued to the chancery court that the Secretary lacked the discretion to deny the tidelands lease for the reasons he gave for the denial, some of which were: the nature of the area and its incompatibility with a casino; the potential for negative environmental impact on Bay St. Louis, the tidelands, and uplands; and costs to the community. In Columbia's view, these issues were under the jurisdiction of other entities like the Gaming Commission, DMR, the Mississippi Department of Environmental Quality (DEQ), the Corps, and Harrison County, whom the Secretary could not second-guess. The Secretary's authority was over the terms of the lease only, and not over whether to grant the lease, Columbia argued.

Nowhere in the statutes is the Secretary's power to deny a tidelands lease explicitly stated. Therefore, to resolve the issue, the court had to analyze and synthesize the Secretary's statutory powers with respect to public trust tidelands. Miss. Code § 29-1-107 authorizes the Secretary to lease tidelands. Miss. Code § 7-11-1 states "The secretary of state shall have charge of the swamp and the overflowed lands . . . and of all other public lands belonging to or under the control of the state. The regulation, sale and disposition of all such lands shall be made through the secretary of state's office. The secretary of state shall sign all conveyances and leases of any and all state-owned lands." The Public Trust Tidelands Act declares that tidelands are held by the state in trust for the use of all the people,[3] and that the state's public policy is to preserve tidelands in their natural state except when an alteration would serve a higher public interest consistent with the public trust.[4]

Reading the statutes together, the court determined that the Secretary's role with respect to public trust tidelands is that of trustee, with the usual trustee's duty "to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent persons of discretion and intelligence in like matters employ in their own affairs."[5] This duty distinguishes the Secretary from other state officials, giving him a broader and less "scientific" power. With respect to the other agencies involved with casino permitting, the court reasoned that the Secretary has a veto power equal to theirs. In addition, the Secretary acts in a quasi-judicial role when determining if a proposed tidelands lease would serve a higher public interest than would leaving the tidelands in their natural state. The judgment call on whether to grant the lease was within the Secretary's power to make, the court concluded.

The court did not stop there, though. The final section of the opinion, entitled "Concluding Remarks," begins "Certainly, Columbia should be upset. There are no set rules to follow. A citizen is left without a clear indication of the process, of the requirements, and of how to proceed."[6] The chancellor goes on to recognize that the Secretary has followed the limited direction the legislature has given him, but also to suggest that the Secretary adopt a more formal decision-making process.

The Mississippi Supreme Court Decision

On appeal to the state supreme court, Columbia raised a variety of issues. Columbia disputed the chancery court's finding that the Secretary is trustee of the public trust tidelands with "veto power" over other state agencies with their own legislative authority; argued that he abused his discretion by denying the lease; and, emboldened by the chancellor's "Concluding Remarks," asserted that the Tidelands Act as interpreted is unconstitutionally vague.

The supreme court reduced the questions to one: "whether the Secretary of State has the final decision-making authority concerning a proposed public trust tidelands lease." The answer, the court held, is yes. It arrived at that answer by retracing the chancery court's reasoning and affirming the chancellor's conclusion that the Secretary is trustee of the tidelands, with "veto power" over gaming facilities proposed to be located on tidelands. The Secretary has discretion to deny a lease, even if the Gaming Commission has approved the site, if he determines that the public interest in the natural tidelands is greater than the public interest in the lease.

Mississippi Secretary of State Eric Clark Photo from website of the Mississippi Secretary of State

The court also rejected Columbia's assertion that the Public Trust Tidelands Act denies it due process of law because it is unconstitutionally vague. The court observed that the mere fact that the Secretary has discretion, making the outcome of a lease application somewhat uncertain for the applicant, is not enough to deny the applicant due process of law.

Conclusion

The Supreme Court of Mississippi held that Secretary of State Eric Clark acted within his legal authority when he denied Columbia Land Development, LLC, a public trust tidelands lease for a casino vessel, when the Mississippi Gaming Commission had approved the site. The court affirmed that the Secretary of State is legally the trustee of the public trust tidelands, and reaffirmed the constitutionality of the Public Trust Tidelands Act.

ENDNOTES

1. Miss. Code § 29-1-107(2) provides "The Secretary of State, with the approval of the Governor, may rent or lease surface lands, tidelands or submerged lands owned or controlled by the State of Mississippi lying in or adjacent to the Mississippi Sound or Gulf of Mexico or streams emptying therein, for a period not exceeding forty (40) years for rental payable to the state annually."
2. *Columbia Land Dev., LLC v. Clark*, Cause No. 97-00128 (Ch. Ct. Harrison County, Miss. Nov. 14, 2001) (*Columbia I*).
3. Miss. Code § 29-15-5.
4. *Id*. § 29-15-3.
5. *Columbia I*, slip op. at 12.
6. *Id.*, slip op. at 19.

Clean Water Act, from page 11

Conclusion

Although it did not finally resolve the conflict between the Tribe and SFWMD, the Supreme Court did clarify the Clean Water Act by holding that a point source may add a pollutant to water even when the pollutant is not generated by the point source itself. *Water Log* will follow the case's progress as it works its way through the lower courts.

ENDNOTES

1. 33 U.S.C. §§ 1311(a), 1362(12).
2. *Id*. § 1362(7).
3. *Miccosukee Tribe v. SFWMD*, Nos. 98-6056-CIV and 98-6057-CIV (S.D. Fla. Sept. 30, 1999).
4. *Miccosukee Tribe v. SFWMD*, 280 F.3d 1364 (11th Cir. 2002).
5. *SFWMD v. Miccosukee Tribe*, 124 S.Ct. 1537, 1543 (2004).
6. 545 F.2d at 1377.
7. 693 F.2d at 175.
8 102 F.3d at 1299.
9. 273 F.3d at 491-93.
10. 124 S.Ct. at 1543 (emphasis added).
11. *Id*. at 1544.
12. Tr. of Oral Argument 4.
13. *Id*. at 14.

Fisheries Act, from page 2

mercial interests. Based on this disparity Delta filed a lawsuit against the Council and the Secretary in his official capacity seeking a declaration that: (1) the composition of the council was not fair and balanced; (2) shrimp aquaculture is not a commercial fishing interest, and thus should not be considered a commercial fishing interest for council membership purposes; and (3) when an imbalance on the council already exists, a list of nominees drawn only from recreational fishing does not satisfy the Act's requirements. Delta also requested a preliminary (non-permanent) injunction prohibiting the Secretary and the Council from appointing new members, allowing new members to take their seats, and conducting any business that affects commercial fishermen.

The government responded to this complaint with three reasons for the court to dismiss the case: first, the U.S. had not waived its sovereign immunity; second, the Act does not provide for a private right of action challenging the composition of the council; and third, Delta did not have standing to sue under Article III of the U.S. Constitution.[4] For these three almost ironclad reasons, the government washed its hands of the complaint. The district court did so as well, concluding that it lacked jurisdiction to hear the suit.

The Fifth Circuit's Evaluation of the Suit

Utilizing its right to affirm summary judgments on any of the legal grounds raised in the lower court, the Fifth Circuit affirmed the district court on the Article III standing issue. For Article III standing the complainant must show that there was an injury in fact, that the injury was caused by the conduct complained of, and that the injury could be redressed by a favorable decision by the court.[5] In this case, Delta failed to establish the first requirement. An injury in fact requires some sort of concrete, palpable and distinct, and actual or imminent injury. Delta never challenged any particular fishery plan, regulation, order, or enforcement action of the allegedly unbalanced board, or challenged any specific council appointment. Instead, Delta relied on the argument that the possible deviation from the "fair and balanced" requirement of the Act was the injury in fact. The circuit court acknowledged this argument but pointed out that what Delta was actually arguing for was its interest in the proper application of the law. Unfortunately for Delta, it is well established that the frustration of such an interest by itself is not an injury in fact that supports Article III standing. Thus, with Delta having no standing to press its claim, the lower court's dismissal for lack of jurisdiction was proper.

Even though the analysis could have stopped there, the court added an extra note about why Delta would lose on the sovereign immunity issue as well. It is a fundamental concept that the U.S. has to consent before it can be sued, and federal jurisdiction is not established without that consent.[6] Delta thought it had overcome this problem by citing to language in the Act that gave district courts exclusive jurisdiction over cases and controversies arising under the Act's provisions. Unfortunately, previous holdings of this circuit court have stated that federal statutes giving jurisdiction over certain cases or controversies to district courts are not necessarily waivers of sovereign immunity. Waivers by the U.S. must be clear and unequivocal; otherwise, denial of jurisdiction is proper.

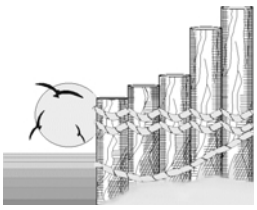
Conclusion

The conclusion of this case reads like a "moral of the story" from a child's storybook. Although it may appear on the surface that the government has disregarded or incorrectly applied part of a statute, without a specific complaint on a particular element of the statute a lawsuit will not go very far in the legal system. Here, Delta did not assert a concrete and particularized injury in fact from a misapplication of the Magnuson-Stevens Act, and therefore did not have standing to bring its claim. Also important to remember is that to sue the government you have to be sure that the government has consented to be sued. The federal government had not clearly and unequivocally consented to be sued under the Magnuson-Stevens Act. The moral of this story? Be sure to address the basics of a lawsuit – standing and jurisdiction - first.

ENDNOTES

1. 16 U.S.C. § 1801 (2000).
2. *Id.* at § 1852 (b)(2)(C).
3. *Id.* at § 1852 (b)(2)(B).
4. "Article III standing" refers to language in Article III of the U.S. Constitution that federal jurisdiction extends "… to all *cases*, in law and equity, arising under the constitution… to *controversies* to which the United States will be a party…" U.S. Const. Art. III, § 2, cl. 1 (emphasis added).
5. *E.g., McConnell v. Fed. Election Comm'n*, 124 S.Ct. 619, 707 (2003).
6. *E.g., U.S. v. Navajo Nation*, 537 U.S. 488 (2003).

Lagniappe *(a little something extra)*



Around the Gulf . . .

Kudos to Mississippi farmer **Jack Branning** for winning a **2004 National Wetlands Award**. Mr. Branning was honored for protecting 3,498 acres of native bottomland hardwood wetlands by enrolling his Vicksburg farm in the Natural Resources Conservation Service's Wetlands Reserve Program. The award is given by a group of sponsors that includes the Environmental Law Institute and the U.S. Environmental Protection Agency.

Mississippi's renowned **Pascagoula River**, along with Bear Creek in north Mississippi, will become eligible for the state's **Scenic Streams Stewardship Program** when the governor signs a bill passed by both houses of the legislature. Streams that possess unique or outstanding scenic, recreational, geological, botanical, fish, wildlife, historic or cultural values may be designated under the Program. People who donate conservation easements on these streams can receive income tax credits. For more information on the Program, see *A Citizen's Guide to Conservation Easements in Alabama and Mississippi* at http://www.olemiss.edu/orgs/SGLC/citizen.pdf.

In Alabama, a state judge has reduced a **record jury award** against Exxon Mobil from $11.9 billion to a mere $3.6 billion. In 2003 a jury found that Exxon Mobil had intentionally attempted to defraud the state of royalties from natural gas wells located in state-owned waters on the Alabama coast. The award was reduced to keep it in line with U.S. Supreme Court guidelines. The reduced award was still the highest anywhere in 2003, and Exxon Mobil is appealing the case to the Alabama Supreme Court.

In March the U.S. Minerals Management Service conducted its annual auction of **offshore oil and gas leases** in the central Gulf of Mexico. A gaggle of exploration companies bid $368.8 million for leases on 557 tracts. "Deep gas" deposits - located in shallow water, but deep underground - were a hot item, accounting for 340 of the bids. Seventy-three bids were on tracts between 2,600 and 5,300 feet deep, and ninety-one were below 5,300 feet. The federal government must approve the bids before exploration can begin.

In February the U.S. EPA issued its **Draft National Coastal Condition Report II**, a comprehensive report on the condition of the nation's estuarine waters and coastal fisheries. The Report, based on data from federal, state, and local agencies, describes the various indicators of ecological health including water and sediment quality, habitat conditions, and fish contamination. The overall condition of U.S. coastal waters is judged to be fair to poor; the overall condition of Gulf Coast estuaries is fair. The final report is expected to be released in Fall 2004. The draft report may be viewed at http://www.epa.gov/owow/oceans/nccr2/. EPA will take comments until June 7.

Around the country . . .

On March 19 the EPA and the Food and Drug Administration issued a consumer advisory about **mercury in fish and shellfish**. The advice is intended mainly for women who are or may become pregnant, nursing mothers, and young children. In addition to recommending safe quantities of certain fish, the advisory emphasizes the positive health aspects of eating fish and shellfish. For more information, visit the FDA's website at http://www.cfsan.fda.gov/seafood1.html.

On a positive note, **water conservation in the U.S. is working** says the U.S. Geological Survey. Despite population growth of more than forty million people, water use declined from 440 billion gallons per day in 1980 to 408 billion gallons per day in 2000. Much of the savings comes from more efficiency in agricultural irrigation and the cooling of power plants. Household use is about one hundred gallons per person per day. USGS chief hydrologist Robert Hirsch says "the message is that humans are very adaptable creatures. To me that is a very positive message."

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA16RG2258, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The views expressed herein do not necessarily reflect the views of any of those organizations. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Corel Gallery, © Nova Development Corp., Mississippi Secretary of State, and NOAA.

MASGP-04-009-01

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Upcoming Conferences

• June, 2004 •

Water Conferences Worldwide Congress
"Water - A Miracle"
June 2-4, 2004 • Constanta City, Romania
http://tripsa@asticontrol.ro

Groundwater in the West
June 16-18, 2004 • Boulder, CO
http://www.colorado.edu/law/centers/nrlc/ - waterconference/index.htm

Response of Tropical, Temperate and Polar Estuaries to Natural & Anthropogenic Changes
June 20-25, 2004 • Ballina, NSW Australia
http://www.scu.edu.au/ecsa37erf2004conference

International Energy Policy, the Arctic and the Law of the Sea
June 23-26, 2004 • St. Petersburg, Russia
http://www.virginia.edu/colp/conference.htm

Coastal Zone Canada 2004
June 27-30, 2004 • St. John's, NFLD, Canada
http://www.czca-azcc.org/

10th International Coral Reef Symposium
June 28 - July 2, 2004 • Okinawa, Japan
http://www.plando.co.jp/icrs2004/

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

University, MS 38677

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